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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

In re Yasmine O., et al., Persons Coming
Under the Juvenile Court Law.

2d Civil. No. B222594
(Super. Ct. No. J1285831, J1285832)
(Santa Barbara County)

SANTA BARBARA COUNTY CHILD
WELFARE SERVICES,

Plaintiff and Respondent,

v.

CHANTAL B. et al.,

Defendants and Appellants.

Chantal B. (mother) and Mark O. (father) appeal the orders of the juvenile court denying their modification petitions and terminating parental rights to their daughters, Yasmine and Mariah O. (Welf. & Inst. Code, §§ 388, 366.26, subd. (c)(1).)¹ The parents filed separate briefs, also asserting that 1) the court should have placed the children with the maternal grandmother; 2) that it erred in finding that the parental benefit exception to adoption did not apply (§§ 366.26, subd. (c)(1)(B), 361.3, subd. (a)); and 3) that Child Welfare Services (CWS) failed to comply with the Indian

¹ All further references are to the Welfare and Institutions Code unless otherwise stated.

Child Welfare Act (ICWA) notice requirements. (25 U.S.C. 1901 et seq.; § 224 et seq.) We affirm.

FACTS

On January 20, 2009, Yasmine (age 6) and Mariah (age 2) were detained following allegations of failure to protect. (§ 300, subd. (b).) Several days earlier, CWS had visited the home of the parents. The home was filthy and smelled of marijuana. Found inside was marijuana, scales and drug paraphernalia. Both children were dirty and had lice. Soiled diapers were under Mariah's crib and dirty clothes were all over the floor. The refrigerator was empty, and Yasmine informed the CWS worker that they did not have any food.

Mother told CWS that father did not reside in her home due to her section 8 housing agreement. She admitted that he was in the home almost daily, through 9:00 p.m. Father has a criminal history and is currently on probation for domestic violence against mother and willful cruelty to a child. Mother had several bruises on her upper arm, caused by a dispute several days earlier, in which father grabbed her. The parents are unmarried.

CWS had received over six referrals on parents since 2005. They addressed substance abuse, domestic violence and physical abuse of the children. Mother had been issued an emergency restraining order against father, but still had contact with him.

At the jurisdiction hearing on February 9, 2009, the trial court found true the allegations in the petition and ordered the children placed with their maternal great aunt and uncle, Clara and Pedro G. (collectively "Clara G."). At the dispositional hearing on March 2, the parents were offered reunification services. According to the disposition report, both children were doing well in Clara G.'s home. Yasmine is the leader and Mariah looks to her for direction. Of concern were incidents in which Yasmine ran away from school. On one occasion, she tried to find her mother, and the second time she tried to see a friend.

Visitation was frequent between parents and children, which was supervised by Clara G., in her home, at church and family gatherings. The parents helped Yasmine with her homework, to prepare and clean up after dinner, and put the children to bed. The parents were able to practice the parenting skills they learned in parenting class, under the supervision of Clara G.

On February 25, Clara G. received an anonymous telephone call reporting that the maternal grandmother, Martha F., was requesting that the children be placed with her. The caller alleged that there were drug users, methamphetamine and marijuana in maternal grandmother's home and that she used drugs.

At the six-month status review on August 17, 2009, CWS recommended that reunification services be terminated as to both children. CWS concluded that parents had put partying with their friends and their own destructive co-dependent relationship above the needs of their children. They continued to use drugs and alcohol and father had been arrested twice. The parents were incapable of staying out of jail, and Clara G. was unwilling to adopt the children.

CWS reported that mother's whereabouts were unknown from July 2009 through mid-August. In early July she contacted CWS, and reported that she was moving into a homeless shelter in Santa Maria. She had obtained an emergency protective order against father because he had hit her. Mother was on probation for child cruelty. She had several missed drug tests and had a positive test for THC and methamphetamine. Mother "tested dirty" for most of February, March, April, May and June. A warrant was issued for a failure to appear, and she turned herself in on August 17.

Father was in jail for a probation violation and was to be held until September 2009. In March he had tested positive for THC. In May he was arrested for driving under the influence of alcohol, but the charge was later changed to exhibition of speed and a probation violation. In July he was arrested for a domestic violence charge involving mother, but that was later dropped. Prior to his

incarceration, father was in a drug treatment program. He "tested dirty" for most of March, April and May, and was dropped from the program for noncompliance.

As to visitation, mother was unable to visit regularly through the review period. When she did visit, she would ignore Yasmine and spend time playing with Mariah. Mother did not monitor or correct her children's behavior during visitation. CWS stated that future visitation with the parents was not appropriate due to their continued drug use and trouble with the law. The children were adjusting well and their behavior was improving. Yasmine had weekly therapy with Amy Wilborn, and a referral had been made to Sojourn Services for Mariah. A contested six-month review hearing was held on August 19, 2009. The court terminated reunification and set the matter for a section 366.26 hearing.

In September 2009, the children were moved from Clara G.,'s home into a Non-Relative Extended Family Member (NFREM) home. Clara G. had consistently stated that she could only care for them temporarily. After the move, the NFREM caregivers requested that the children be removed from their home because they had been sexually acting out. In addition, various family members had been making harassing phone calls to the home of the NFREM caregivers and would not stop. In November, the children were temporarily placed back with Clara G.

In December 2009, both parents and the maternal grandmother filed JV-180 petitions to change a court order. The parents requested that reunification services be reinstated. Maternal grandmother requested that the children be placed with her.

CWS issued a section 366.26 report for the December 14, 2009 hearing, recommending termination of parental rights for both mother and father. It indicated that Clara G. had decided she would like to adopt the children. An addendum report, filed January 27, 2010, stated that Clara G. had changed her mind and wanted the children moved to an adoptive home. She stated that the parents had monthly visitation with the children at her house. Clara G. reported that the children are always excited to see them and that mother carries Mariah throughout the visitation. Clara G. said the parents spoil the girls, giving them anything they want. After visitation, there

are usually behavioral issues. They also have sexualized behaviors. Clara G. feels the girls need to remain in counseling and moved to an adoptive home. She does not feel they would be properly cared for by their parents.

Included in the report was a statement by Yasmine's therapist, Amy Wilborn. She had been seeing Yasmine since April 2009, and also worked with Mariah. Wilborn saw little parental contact from April to November, even though the parents had opportunities to visit with and speak to the children. Wilborn felt the children were "ok" with not seeing their parents, and had adjusted well to living without them.

In a second addendum report, filed January 27, 2010, CWS indicated that it was not in agreement with maternal grandmother's request that the children be placed with her. They submitted information that calls for service from law enforcement were made to maternal grandmother's address for numerous visits including drugs, gang members in the home, suspicious activity and domestic violence. CWS stated that "it does not feel that this is an appropriate environment for the children."

On January 8, 2010, the children were removed from Clara G.'s home and placed in the home of the prospective adoptive parents. On January 25-27, the court held a three-day combined section 388 and 366.26 hearing in which it denied all three section JV-180 petitions and terminated parental rights.

DISCUSSION

Combined Section 388 and 366.26 Hearings

1) JV-180 Petitions

Mother, father and maternal grandmother each filed a JV-180 petition to change a court order. Mother requested that the court reinstate reunification services for six more months. She stated that she now has a stable place to live and is sober and testing clean from all substances. She has been attending counseling, Alcoholics Anonymous/Narcotics Anonymous (AA/NA) meetings and parenting classes. Every

week she volunteers at the Salvation Army and goes to church. Mother is looking for employment and working towards obtaining her GED and continuing her education.

Mother stated that extending reunification would be better for the children because they "have had so many emotional issues since being taken from [the parents'] custody." She explained that she and her daughters are very close and do everything together. They want nothing more than to be with their parents. Since their removal, Yasmine has had to take "anxiety/hyperactivity" medication because she has been extremely traumatized from moving so much during the year. One daughter now wets the bed, has lost weight, spends a great amount of time praying for her parents and crying. Both parents talk to the children regularly and attend the same church. At church, the girls are very excited to see the mother and father and want everyone to know they are their parents.

Mother expressed remorse for her drug use and the harm it has caused the children. She acknowledged that neither she nor father understood the impact of their actions and did not make the proper efforts at the beginning of reunification. Mother attached to her petition evidence of her attendance in parenting, counseling and anger management classes.

Father also requested that the court reinstate reunification services. He said that he had made changes in his life over the past four months that demonstrate his commitment to his children. Father had completed the Sheriff's Treatment Program (STP) while in jail. The treatment included a 14-week anger management class. Since his release in September 2009, father has complied with all probation terms. He has also completed his parenting education, taken drug and alcohol education classes and maintained monthly visitation with his daughters. Father works full time at a restaurant.

The maternal grandmother stated in her petition that she had not been considered for placement of her grandchildren. She indicated that she would be able to give them love and stability and would keep them in the family. Maternal grandmother stated that she participates in many aspects of the children's school

projects and extra-curricular activities. She believes that Clara G. views her as financially and physically incapable of caring for the children. Maternal grandmother made reference to "accusations in the court report" about her, which she said were untrue. She stated she "may have made mistakes in [her] life but nobody's perfect and that is in the past." Maternal grandmother asserted that she could provide a quiet environment in which the children know they are safe and loved. She did not allege any changed circumstances.

2) Testimony

At the hearing, father testified that he began attending AA/NA meetings after his release from jail, but then got a job working nights at Taco Bell, so has to sleep during the day. He is living with his grandmother in order to save money. His relapse prevention plan is to work 40-45 hours a week and keep himself occupied. He plans to stay away from the people he used to associate with and stay home and watch movies. When father sees his daughters they are always asking him when he is going to get a house so they can move in with him.

Mother testified that she is unemployed and has no place to live. She is staying at a friend's house. She attends two parenting classes and volunteers at the Salvation Army two days a week, serving food. She attends Celebrate Recovery once a week. Saturday is her day off and on Sunday she goes to church. Mother testified that she has turned her life around, and just needs a job and a place to live. Admitted into evidence was a letter from mother's probation officer, dated December 30, 2009, indicating that mother is in full compliance with the terms of her probation.

Mother indicated that she had complied with her case plan, but did not stop using marijuana right away. She testified that she was upset at losing everything and then getting a three-day notice to move. Mother was testing clean, but relapsed in July, after her uncle passed away. The last time she used marijuana was the day she turned herself in to her probation officer, on August 17. She attends AA/NA meetings "off and on" when she is home and has nothing to do. She does not have a sponsor, but prays a lot. She is not attending any drug outpatient program because she has no

money. Mother testified she would be together with father except that probation has not lifted the restraining order against him. Mother could see no reason why she and father and their children could not live together now.

The maternal grandmother testified that the children have stayed in her home once a month since they were born. She said she had applied for relative placement and her home was approved. She misses the children and wants them home.

The social worker, Jose Velasquez, testified that relative placement was considered when Clara G. decided not to adopt the children. Maternal grandmother had applied for placement and her home had passed the safety check. She had an extensive criminal history, but a licensing exemption had been granted. Police logs showed 20 service calls to her home between August 2009 and January 2010. Velasquez had final input as to whether or not to recommend placement. He decided that placement with maternal grandmother was inappropriate due to her previous criminal history and concerns about exposing the children to possible gang activity, drugs or domestic violence. The decision to deny placement was made before the children were removed from Clara G.'s home in January 2010.

Clara G. testified that the children "love their father to death" and are happy to see him. He did not display parenting skills during his visits. "It was more of a playing thing and kissing and I love you and let's color together, and stuff like that." The girls would often ask their father when they could come live with him again. During the eight or nine months Clara G. had the children, they only asked for their parents about four times. During the last six months, she had seen five visits between mother and the children. They were always happy to see their parents and were sometimes sad when they left.

Yasmine's therapist, Amy Wilborn, testified that she had not seen any visits between parents and children in the last six months. She recalled one occasion when Yasmine had spoken about her mother. Yasmine told Wilborn that she did not want to tell her friends at school that her parents were in jail, because they might not

like her. Yasmine initially came into therapy because she would not listen and would run away from the yard if unsupervised. She would also steal things. These behaviors improved during therapy.

The children's maternal aunt, Aime B., testified that the children stayed with her every weekend, and she saw them interact with their parents at church and family gatherings. As soon as they caught sight of their parents "the rest of the world disappeared." Mariah is very attached to her father and spoke of him often. When they learned of their new placement, Yasmine said she would rather die than have to go with other people. She said, "[i]f I can't see my family, I'm going to kill myself."

Aime B. testified that father had made an extreme change. He has become much more mature and responsible. He does not drink, do drugs, and works the night shift. He has no outside life except working, going to church and attending recovery groups. Aime B. believed it would be in the girls' best interest to have a chance to reunify with father. Over the last six months, Aime B. has seen mother approximately once a week. She is in a living situation that is not a positive place for herself or her children. Her personal attitude has improved. She is not drinking or doing drugs, and not associating with people who do. She is going to group therapy.

3) Juvenile Court's Ruling

The court denied all three JV-180 petitions, finding that none had demonstrated changed circumstances. It found the children adoptable by clear and convincing evidence and that it was in the children's best interest to be adopted. The court ruled that the parents had not met their burden of proving the parental benefit exception to the termination of parental rights. It found the testimony of the witnesses who testified as to the lack of bonding between parents and children to be credible. It determined that the witnesses who testified to the existence of a parent-child bond lacked credibility. The court terminated parental rights.

Under section 388, a juvenile court is authorized to modify a prior order if a petitioning parent shows a change of circumstances or new evidence and establishes that modification is in the best interests of the child. (§ 388; *In re*

Stephanie M. (1994) 7 Cal.4th 295, 317; *In re Eric E.* (2006) 137 Cal.App.4th 252, 260.) The court has broad discretion in resolving a petition to modify a prior order. Its determination will not be disturbed on appeal unless an abuse of discretion is clearly shown. (*In re Stephanie M.*, at p. 318.) "It is not enough for a parent to show *just* a genuine change of circumstances under the statute. The parent must show that the undoing of the prior order would be in the best interests of the child. [Citation.]" (*In re Kimberly F.* (1997) 56 Cal.App.4th 519, 529.)

In determining the best interests of the child, the juvenile court shall consider the reason for the dependency, the reason the problem was not overcome, the strength of the parent-child and child-caretaker bonds, the length of time the child has been a dependent, the nature of the change of circumstance, the ease by which the change could be achieved, and the reason it was not made sooner. (*In re Aaliyah R.* (2006) 136 Cal.App.4th 437, 446-447.)

Here, the dependency was necessary because the children were found in a dirty house that smelled of marijuana and contained marijuana paraphernalia. There was domestic violence between the parents, and both used marijuana and methamphetamine.

These problems were not overcome because the parents did not immediately avail themselves of services and failed to comply with their case plans. At one point during the dependency mother disappeared. On another occasion, both parents were incarcerated. It is commendable that both attended the STP program while in jail, but they fell far short of completing their case plan goals.

Both parents "tested dirty" for marijuana and methamphetamine. Despite the knowledge that they could lose their children, both continued to use drugs and were unable to stay out of jail. Although a restraining order was in effect, mother continued to see father, who was violent with her. These factors prevented the parents from overcoming the problems that led to the dependency.

The parent-child relationship was not strong. Mother was unable to visit regularly due to her disappearance and incarceration. During the visitations that

mother managed to attend, she focused her attention on Mariah and ignored Yasmine. She did not correct their behavior. Father played with them, but did not impose any discipline. Both parents spoiled the children, creating behavioral problems for Clara G. after their departure. Both were inconsistent with their visitation, even after their release from jail.

After her release, mother only attended AA/NA meetings when she had nothing else to do. She has been unable to get a job, find adequate housing or participate in anything other than parenting classes. Mother has no awareness of the domestic violence history between herself and father and cannot see how that would be detrimental to the children. In fact, she sees no reason why they should not all live together now.

Although employed, father's relapse prevention plan is to work full-time and keep himself occupied. He testified that he cannot attend AA/NA meetings because he sleeps during the day due to his night job. He appears not to have investigated AA/NA meetings that are scheduled in the hours before or after his night shift.

The dependency lasted six months because Mariah was under age three when the siblings were removed from the home. There has been no change in circumstances justifying a modification of the court's order. Termination of reunification was in the best interests of both children. They are now in a stable adoptive home and will no longer be subjected to the uncertainty and emotional trauma of repeated placements. Nor has maternal grandmother shown a change in circumstances. She has a criminal history and there continues to be criminal activity in her home. CWS considered these factors when it determined that the location is not safe for children. The juvenile court did not abuse its discretion in denying the petitions.

Parental Benefit Exception to Adoption

Mother and father contend the juvenile court erred by ruling that the parental benefit exception to adoption does not apply. Section 366.26, subdivision

(c)(1) requires the juvenile court to terminate parental rights if it finds by clear and convincing evidence that a child is likely to be adopted. However, a court may choose not to terminate rights if it finds, under an enumerated exception, "a compelling reason for determining that termination would be detrimental to the child" (*Id.*, subd. (c)(1)(B).) One such exception applies when there exists a beneficial parental relationship. This exception requires a showing of "regular visitation and contact with the child and [that] the child would benefit from continuing the relationship." (*Id.*, subd. (c)(1)(B)(i); *In re Angel B.* (2002) 97 Cal.App.4th 454, 466.)

"To meet the burden of proof, the parent must show more than frequent and loving contact, an emotional bond with the child, or pleasant visits. [Citation.]" (*In re Dakota H.* (2005) 132 Cal.App.4th 212, 229.) There must be proof of a parental relationship, not merely a relationship that is "beneficial to some degree but does not meet the child's need for a parent." (*In re Jasmine D.* (2000) 78 Cal.App.4th 1339, 1350.) The existence of a beneficial relationship is determined by the age of the child, the portion of the child's life spent in parental custody, the quality of interaction between parent and child, and the child's particular needs. (*In re Amber M.* (2002) 103 Cal.App.4th 681, 689.)

Courts are divided as to the standard of review to be applied to a finding on the parental relationship exception. Most have applied a substantial evidence standard, which asks whether there is any substantial evidence, contradicted or otherwise, supporting the juvenile court's finding. (*In re Derek W.* (1999) 73 Cal.App.4th 823, 827; *In re Casey D.* (1999) 70 Cal.App.4th 38, 52-53; *In re Autumn H.* (1994) 27 Cal.App.4th 567, 576.) Others have reviewed the finding for an abuse of discretion. (*In re Jasmine D.*, *supra*, 78 Cal.App.4th at p. 1351.) Under either standard, the juvenile court's finding is proper. Termination of parental rights would not be detrimental to the children. To the contrary, it would create stability. For the reasons stated above, there was little visitation by either parent to justify continued contact. In fact, regular contact with the parents created a chaotic and emotionally damaging environment.

Visitation was sporadic. Clara G. testified that both parents were unable to correct the children's behavior. CWS reported that mother focused her attention on Mariah and ignored Yasmine. Clara G. indicated that father's visits were more of a playtime and the parents spoiled the children during visitation. The parents' relationship to the children reflects pleasant visits, but no parent-child bond.

Yasmine's therapist stated that there had been little contact with the children during seven months of treatment--even though parents had the ability to do so. Yasmine had spoken of her mother only once during four months of treatment. Although Clara G. and Aime B. (the children's aunt) spoke of the loving parent-child bond, the juvenile court found that their testimony was not credible.

Even if mother and father had satisfied the first prong of the exception requiring regular visitation, they failed to meet the second prong requiring proof of a beneficial parental relationship with the children. Substantial evidence supports the juvenile court's finding that mother and father failed to prove that the parental benefit exception applied.

Compliance with Indian Child Welfare Act

The parents contend that CWS failed to comply with the Indian Child Welfare Act (ICWA). They assert that CWS did not conduct the required investigation of the knowledgeable parties and did not provide the BIA with the required information.

ICWA imposes on the juvenile court and social service agencies an affirmative duty to inquire whether a child subject to a dependency proceeding is or may be an Indian child. (*In re K.M.* (2009) 172 Cal.App.4th 115, 118-119.) Proper notice allows tribes to determine whether a child is or may become a member and to assert their right to intervene in the dependency proceedings. (*In re J.T.* (2007) 154 Cal.App.4th 986, 994.)

The notice "must contain enough information to be meaningful. [Citation.] The notice must include: if known, (1) the Indian child's name, birthplace, and birth date; (2) the name of the tribe in which the Indian child is enrolled or may be

eligible for enrollment; (3) names and addresses of the child's parents, grandparents, great grandparents, and other identifying information; and (4) a copy of the dependency petition. [Citation.] To enable the juvenile court to review whether sufficient information was supplied, [the] Agency must file with the court the ICWA notice, return receipts and responses received from the BIA and tribes. [Citation.]" (*In re Francisco W.* (2006) 139 Cal.App.4th 695, 703.)

Mother submitted an ICWA-020 form indicating that she may have ancestry in the Coastal Chumash tribe and Cahuilla band. At the detention hearing, mother repeated his information to the court. Mother said maternal grandmother was a tribal member and would have more information. Maternal grandmother, who was present in the courtroom, said that maternal grandfather was a registered member before his death. The court requested mother's family members to research this issue and provide CWS with the information. A maternal cousin, who had researched the family's genealogy, later reported that the family had ties to the Coastal Chumash and the "Missionhuilla [*sic*]" band, but neither is federally recognized.

CWS contacted the paternal great-grandmother. She stated that her father was part Yaqui, but she did not know where he was born or died. Although requested by the CWS, neither researched the matter or contacted CWS. Paternal grandmother later reported that father's Yaqui heritage was "Mexican-Indian," which is not a federally-recognized tribe.

While the matter was on appeal, CWS augmented the record with evidence of compliance with ICWA notice requirements, which included return receipt of notice to numerous tribes, along with letters regarding enrollment. CWS noticed the Bureau of Indian Affairs, Agua Caliente/Cahuilla Indians, Augustine Band of Cahuilla Indians, Cabazon Band of Mission Indians, Cahuilla Band of Indians, Kiowa Indian Tribe of Oklahoma, Los Coyotes Band of Indians, Morongo Band of Mission Indians, Ramona Band of Cahuilla Indians, Santa Rosa Band of Cahuilla Indians, Soboba Band of Luiseno Indians, and the Torres-Martinez Desert Cahuilla Indians.

All indicated the children were not members or eligible for membership. The augmented record also contained the juvenile court's finding that ICWA did not apply.

The parents' argument is rendered moot due to CWS compliance with ICWA notice requirements while the appeal was pending. (*In re C.D.* (2003) 110 Cal.App.4th 214, 226.)

DISPOSITION

The judgment (order terminating parental rights) is affirmed.

NOT TO BE PUBLISHED.

COFFEE, J.

We concur:

YEGAN, Acting P.J.

PERREN, J.

James E. Herman, Judge
Superior Court County of Santa Barbara

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